EVERGREEN CHARTER SCHOOL,	
Employer,	
and	
ALISON GREENE,	Case No. 29-RD-175250
Petitioner,	
and	
EVERGREEN CHARTER STAFF ASSOCIATION, NYSUT, AFT,	
Union.	

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#### UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD

EVERGREEN CHARTER SCHOOL,

Employer,

and

ALISON GREENE,

Case No. 29-RD-175250

Petitioner,

and

EVERGREEN CHARTER STAFF ASSOCIATION, NYSUT, AFT,

Union.

#### <u>INTRODUCTION</u>

This brief is submitted on behalf of the Evergreen Charter School (hereinafter referred to as "Evergreen") in opposition to the Request for Review of the Decision and Direction of Election of the Regional Director, James G. Paulsen of Region 29 of the National Labor Relations Board (hereinafter referred to as "NLRB" or "Board") filed by the New York State United Teachers, Evergreen Charter Staff Association, AFT (hereinafter referred to as "Union") in the above-captioned matter. In the Decision and Direction of Election, the Regional Director issued the only appropriate finding applying entrenched United States Supreme Court and NLRB precedent when he determined that Evergreen was subject to the Board's jurisdiction. Notwithstanding the hopeful contentions of the Union, Evergreen is a government contractor and employer, not a political subdivision of the State of New York, and subject to the National Labor

Relations Act (hereinafter referred to as "NLRA"). Thus, squarely within the Board's jurisdiction.

Accordingly, and under any reading of Section 102.67 of the Board's Rules and Regulations, Evergreen respectfully submits that there is no basis in the law or in fact for the Union's Request for Review. As such, Evergreen urges that the Request for Review be denied in its entirety.

#### PROCEDURAL HISTORY

The procedural history of the Case properly leading to the Regional Director's finding that Evergreen is a government contractor and subject to the Board's jurisdiction is fully set forth in the Union's Request for Review and shall not be repeated herein except insofar as they are integrated within the legal argument which follows.

#### STATEMENT OF FACTS

#### A. The New York Charter Schools Act

The New York Charter Schools Act (hereinafter referred to as "Act") was adopted in Article 56 of the New York State Education Law in December, 1998 and expressly provides that an application to establish a charter school may be submitted by individuals, such as teachers, parents, school administrators and community residents. N.Y. Educ. Law Section 2851(1). Likewise, a charter school can be created "in conjunction" with an existing educational institution, non-profit corporation or for-profit corporation. Id. Pursuant to statute, applications are submitted to a "charter entity", defined as either a local school district, a city school Chancellor, or the New York State Education Department's Board of Regents. N.Y. Educ. Law Section 2851(3). The charter entity is charged with the responsibility of approving the application to establish any charter school.

Charter school applications include, but are not limited to a mission statement for the school and a description of educational program; a description of student achievement goals for the school's educational program and the chosen method of evaluating whether students have attained the skills and knowledge specified for those goals; the proposed governance structure of the school, including a list of members of the initial board of trustees, terms and method of appointment or election of trustees, the organizational structure of the school, a procedure for conducting and publicizing monthly board of trustee meetings at each charter school, and the process to be followed by the school to promote parental and staff involvement; the admission policies and procedures of the school; a proposed budget and fiscal plan for the school; the requirements and procedures for programmatic and independent fiscal audits; the hiring and personnel policies and procedures of the school, including the qualifications to be used in the hiring of teachers, school administrators and other employees; the rules and procedures for student discipline; the name of the proposed charter school; insurance description; the term of the proposed charter; a description of the health and food services to be provided; and procedures to be followed in the case of the closure or dissolution of the charter school. N.Y. Educ. Law Section 2851(2).

If the application is approved by a board of education or the board of trustees of the State University of New York, then the charter entity and the applicants must enter into an agreement commonly referred to as the "charter". As per N.Y. Education Law Section 2852(5) that charter must include the following:

- (a) The information required by subdivision two of section twenty-eight hundred fifty-one of this article, as modified or supplemented during the approval process,
- (b) In the case of charters to be issued pursuant to subdivision nine-a of this section, information required by such subdivision,

- (c) Any other terms or conditions required by applicable laws, rules and regulation, and
- (d) Any other terms or conditions not inconsistent with law, agreed upon by the applicant and the charter entity...

#### N.Y. Educ. Law Section 2852(5).

Thereafter, the Board of Regents is the only charter entity authorized to ultimately issue a charter pursuant to the Act. N.Y. Educ. Law Section 2851(3)(c). By issuing the charter, the Board of Regents incorporates the founding initiative of the underlying charter school into a non-profit "education corporation" and issues a provisional charter for the operation of the school for up to an initial five (5) year period. N.Y. Educ. Law Section 2853. Upon this incorporation event, individual trustees, retaining authority to appoint and remove themselves, wholly govern the charter school by making all policy and operational decisions, with the power to hold property, hire all employees, and to confer academic degrees. Id. The private, corporate character of every charter school is embodied in the requirement to issue annual reports by no later than August 1<sup>st</sup> of each year for the preceding school year and to obtain tax-exempt status under Section 501(c)(3) of the Internal Revenue Code within one year. Pursuant to N.Y. Education Law Section 2854(1)(b), "A charter school shall be exempt from all other state and local laws, rules, regulations or policies governing public or private schools, boards of education, and political subdivisions, including those relating to school personnel and students...". Id.

The Act does <u>not</u> regard charter school teachers as public school teachers. Charter school employees are considered "...employees of the education corporation formed to operate the charter school and not an employee of the local school district in which the charter school is located". N.Y. Educ. Law Section 2854(3). Notwithstanding the Union's broad strokes, charter school personnel may be untenured, sometimes uncertified, and not subject to the N.Y. Civil Service Law. Moreover, State law does not require charter school personnel to be deemed

employees of the local school district for the purpose of providing retirement benefits through the Teachers Retirement System. Instead, and unlike the Union's members in public school districts, eligibility to participate in the Teachers Retirement System is not automatic and optional.

The Act does not make charter schools public schools for the purpose of labor relations. Employees of a charter school not converted from an existing public school, such as Evergreen, are not deemed members of any existing collective bargaining unit representing employees of the school district in which the charter school is located and its employees are not subject to any existing collective bargaining agreement between the school district and the its employees. N.Y. Educ. Law Section 2854(3)(b-1).

Significantly, and as per the New York Charter Schools Act, the regulatory power of the Board of Regents and the Commissioner of Education is expressly limited by statute. Pursuant to N.Y. Education Law Section 2855, "The regulatory power of the board of regents and the commissioner shall not extend to charter schools except as otherwise specifically provided in this article." N.Y. Educ. Law Section 2855(5). While the Act permits a charter entity or the Board of Regents to terminate a charter based on such grounds as a violation of law or the underlying charter itself, no statutory provision allows either the charter entity or the Board of Regents to remove a charter school trustee. On the same front, the Act insulates both the charter entity and the Board of Regents from any liability resulting from the charter school by stating the following in relevant part:

..no civil liability shall attach to any charter entity, the board of regents, or to any members or employees, individually or collectively, for any acts or omissions of the charter school. Neither the local school district, the charter entity nor the state shall be liable for the debts or financial obligations of a charter school or any person or corporate entity who operates a charter school. N.Y. Educ. Law Section 2853 (1)(b-1)(g).

Additionally, the Act designates charter schools "non-public" for textbook, school library materials, health services and for student transportation eligibility. N.Y. Educ. Law Section 2843(4)(a) and (b).

#### **B.** The Evergreen Charter School

Evergreen was established pursuant to the New York Charter Schools Act. On June 23, 2008, Sarah Brewster (hereinafter referred to as "Brewster"), Gil Bernadino (hereinafter referred to as "Bernadino") Arial Sotelo (hereinafter referred to as "Sotelo"), Gladys Rodriguez (hereinafter referred to as "Rodriguez") and Maritza Myers (hereinafter referred to as "Myers") filed an application with the Board of Regents to open and operate Evergreen Charter School in Hempstead, New York. See Joint Exhibit 1. These private individual applicants sought to operate Evergreen as a Kindergarten to Fifth Grade School. As per the testimony of Brewster, Evergreen was started by a group of founding members as a result of the "failing school district in Hempstead" and "in response to the needs of children and families". (T-32-33). Although the Union states the obvious that Evergreen would not exist but for the Board of Regents approval of the June, 2008 application, Brewster also confirmed that neither the State Education Department nor the Board of Regents had any role in the founding initiative of Evergreen. (T-33,49). Any role was limited to its role as a reciprocal of the underlying application. On January 13, 2009, Evergreen was granted a five (5) year provisional charter. See Joint Exhibit 2. Thus, the provisional charter for a term to January 12, 2014 was issued to Brewster, Bernardino, Sotelo, Rodriguez, and Meyers and their successors as an education corporation under the corporate name of "Evergreen Charter School". The provisional charter identified the corporation's principal office to be Circulo de la Hispanidad, 91 North Franklin Street, Suite 200, Hempstead, New York 11550. See Joint Exhibit 2. Circulo has rented space to Evergreen

<sup>&</sup>lt;sup>1</sup> Transcript pages of the hearing as conducted on May 12, 2016 are referred to in the Employer's Brief by (T-\_\_).

in its Community Center. Decision at 11. Significantly, Evergreen's facilities were never housed in a public school building or otherwise connected within the Hempstead Union Free School District. Decision at 12. Moreover, the corporation was created as a non-stock corporation organized and operated exclusively for educational purposes as defined in Section 501(c)(3) of the Internal Revenue Code. *See* Joint Exhibit 2.

Again, on or about January 14, 2009, an Initial Charter (hereinafter referred to as "Charter") was entered into between the Board of Regents and the applicants to establish and to operate Evergreen. *See* Joint Exhibit 2. Section 1.1 of the Charter states the following:

<u>Charter</u>. A charter is hereby authorized and granted to the Applicants on behalf and solely for the benefit of the Charter School as an education corporation incorporated by the Regents which, pursuant thereto, will be authorized to establish, organize and operate a school in accordance with the Act and the terms and conditions of the Charter. This agreement, the Application, which is incorporated herein and attached hereto as Exhibit A, and the oversight plan, attached hereto and incorporated herein as Exhibit B (the "Oversight Plan"), shall constitute the charter (the "Charter") and shall be binding on the Charter School. *See* Joint Exhibit 2.

Section 2.12 of the Charter codified the proposition that Evergreen's Board of Trustees had final authority to make all operational and policy decisions. To wit, Section 2.12 established the governance structure of Evergreen as follows:

Governance. (a) The Charter School shall form a Board of Trustees (the "Board") which shall consist initially of the individuals specifically identified in the Application (the "Founding School Trustees"). All individuals elected or appointed to the Board shall possess the qualifications for such position as are set forth in the Application...The Board shall operate pursuant to the by-laws and other rules and procedures set forth in the Application, including but not limited to, the term of office permitted and the provisions for the election and appointment of new members. The Board shall have final authority for policy and operational decisions of the school, though nothing shall prevent the Board from delegating decision-making authority to officers and employees of the Charter School. See Joint Exhibit 2.

On the same front, and after reference to Joint Exhibit 4, Brewster confirmed that the Board of Trustees has all the powers enumerated by the By-Laws, to wit: the election and

removal of trustees; to select and remove officers, agents and employees of the School; to conduct, manage and control the affairs and activities of the School; to enter into contracts, leases and other agreements; to carry on the business of operating the School and apply any surplus that results from the business activity of the School; to act as trustee under any trust incidental to the School's purpose, with powers to expend funds and property; to acquire real and personal property; to borrow money, incur debt and to execute notes subject to the provisions of the Not-For-Profit Corporation Law; to indemnify and maintain insurance on behalf of trustees subject to the provisions of the Not-For-Profit Corporation Law; and to approve mission statements and policies. (T-44-45).

Reference to Joint Exhibit 4, the By-Laws of Evergreen, under Article III, reveals the selection and removal process for each trustee. Specifically, Article III of Evergreen's most recent By-Laws provides in relevant part the following:

- 1. <u>Election.</u> The Board shall elect Trustees by the vote of the majority of the Trustees then in office. Trustees-elect assume office subject to approval by the Charter Entity.
- D. <u>Removal of Trustees</u>. The Board may remove a Trustee for cause upon majority vote of all Trustees (other than the Trustee subject to removal). In addition, a trustee may be removed from office on examination and due proof of the truth of a written complaint by any trustee, of misconduct, incapacity or neglect of duty; provided, that at least one week's previous notice of the proposed action shall have been given to the accused and to each trustee. The Board may remove a Trustee without cause upon 100% vote of all Trustees (other than the Trustee subject to removal.) *See* Joint Exhibit 4.

The testimony of Brewster confirmed that unlike in local school board elections there is no election process and each trustee of Evergreen is instead selected by a majority of the Board of Trustees. (T-51). Likewise, Brewster confirmed that the Board of Regents does not possess any authority to remove individual trustees of the Evergreen Charter School. (T-35). Brewster also testified that individual trustees of the School are <u>only</u> subject to removal by the Board of

Trustees under both "cause" and "without cause" provisions of the By-Laws. Brewster further testified in no uncertain terms that no State or local municipal actors are involved with the corporate governance function of the School. Specifically, Brewster testified that <u>no</u> officials from the State of New York, the County of Nassau, the Town of Hempstead, the Hempstead Union Free School District and the Village of Hempstead sit on the Board of Trustees. (T-46). To the contrary, Brewster testified that the Board of Trustees, and the Board of Trustees alone, conduct and direct the affairs of the School and are in fact governed by certain provisions of New York Not-For-Profit Corporation Law. (T-46-47).

On the same front, both the First and Second Renewal Charters, introduced as Joint Exhibit 3, references the only appointment mechanism for the Board of Trustees. Both Renewal Charters provide the following:

2.13 Governance; School Trustees; By-Laws. (a) The Charter School shall be governed by a Board of Trustees. All individuals elected or appointed to the Board shall possess the qualifications for such positions as are set forth in the Renewal Application...The Board shall operate pursuant to the bylaws and other rules and procedures set forth in the Renewal Application, including but not limited to the term of office permitted and the provisions for the election and appointment of new members. See Joint Exhibit 3.

As per the Regional Director's Decision and Direction of Election, in August, 2010, Evergreen submitted a request to modify the original Charter. *See* Joint Exhibit 19. The request proposed amending, replacing or eliminating certain provisions relating to curriculum, governance, staffing and equipment. Upon receipt of this request, the Commissioner of Education granted Evergreen permission to make the same non-material changes. Thereafter, on or about December 17, 2013, the Board of Regents issued the First Renewal Charter establishing an expiration date of June 30, 2014. *See* Joint Exhibit 3. In advance of this expiration date, Evergreen submitted a Second Renewal Application and the Second Renewal Charter was thereafter issued on or about April 29, 2014. As the Second Renewal Charter is due to expire on

June 30, 2017, Evergreen recently made a request of the Board of Regents to yet again modify its Charter to include an additional grade of instruction, specifically the Sixth Grade. *See* Joint Exhibit 20.

As per the previously discussed statutory mandate of N.Y. Education Law Section 2854(3), the record establishes that Evergreen secured "non-converted" space in Circulo's Community Center and hired new staff. As such, Evergreen employees are considered employees of the Evergreen education corporation and are not employees of the public school district in which it is geographically located, to wit, the Hempstead Union Free School District. In terms of the collective bargaining history of Evergreen and the Union, the undersigned would largely defer to Regional Director's recital of the same. Specifically, in 2011, Evergreen voluntarily recognized the Union as the collective bargaining representative of the unit of its professional employees, including teachers, teacher assistants, reading specialists, nurses and social workers. On December 21, 2011, Evergreen notified the Public Employment Relations Board of the above-referenced recognition. Both parties jointly submitted a copy of the most recent collective bargaining agreement in effect from July 1, 2013 to June 30, 2016, together with an earlier Memorandum of Agreement dated April 29, 2015. See Joint Exhibits 11/12.

#### **ARGUMENT**

#### **POINT I**

# THE REGIONAL DIRECTOR PROPERLY FOUND THAT EVERGREEN IS AN EMPLOYER SUBJECT TO THE NATIONAL LABOR RELATIONS BOARD <u>JURISDICTION.</u>

Section 2(2) of the National Labor Relations Act defines "employer" as follows:

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned government corporation.

Significantly, the same Section of the Act excludes from the definition of "employer" any State or political subdivision thereof. 29 U.S.C. Section 152(2). While the above-referenced exemption applies to government entities or wholly owned government corporations, it does not apply to any entities acting as contractors for the government.

As the Regional Director found in the underlying decision, the Charter Schools Act enacted by the New York State legislature established a complex regulatory scheme which keeps charter schools within the public realm in many respects, but which also exempts charter schools from many public school laws and regulations. As per the Regional Director, "...because of this hybrid nature, that status of charter schools has been 'difficult to define" and not 'easily identified as either a purely private or public entity." New York Charter Schools Association et al. v. Smith, 15 N.Y. 3d 403, 410 (2010); Decision at 18. While the Regional Director found that charter schools are subject to the same health and safety requirements, civil rights requirements and student assessment requirements as public schools, he described the private nature of charter schools by noting the following:

Charter schools are deemed 'non-public' for certain other purposes such as designation of textbooks, school library materials, and software programs; health services; and eligibility for student transportation. They are otherwise exempt form 'all other laws and regulations governing public or private schools' except as provided in this law (Charter Schools Act). Decision at 8.

The question of whether a charter school is a political subdivision of the State and thus exempt from the jurisdiction of the Board has been addressed by several recent NLRB decisions, including two in this Region. All of the NLRB cases discussing its jurisdiction over charter schools rely upon the Supreme Court case, NLRB v. Natural Gas Utility District of Hawkins County, 402 U.S. 600 (1971), referred to as "Hawkins County", which sets forth the test for determining whether an entity is considered a "political subdivision". That two factor test asks whether the entity was created directly by the state so as to constitute a department or administrative arm of the government, or is administered by individuals who are responsible to public officials or to the general electorate. Id. If either factor or prong is not satisfied, the entity in question is considered a private entity, not considered to be a "political subdivision", and squarely subject to Board jurisdiction. Specifically, the first prong of the Hawkins County test has two sub-parts: that the entity was created directly by the State, and that it was created "so as to constitute" an arm of the government. Decision at 17.

#### A. Evergreen was not created by the State

The state's characterization of an entity as private or public is an "important factor" in determining whether it was created as an arm of the government. Hinds County Human Resource Agency, 331 NLRB 1404 (2000). Testimony adduced at the hearing on May 12, 2016 through Brewster, Vice President of Evergreen, unequivocally demonstrated that Evergreen was not directly created by the State of New York. (T-33). To the contrary, Brewster testified that Evergreen was founded by herself, Bernardino and other individuals acting within their own

private individual capacities, with no founding effort or input from local, State, or federal actors. (T-32). Brewster testified that she was never approached by the Board of Regents or the State Education Department to start the charter school or required to do the same by any State entity. (T-33). Also, Brewster stated that no public entity assisted the private actors in the founding initiative of Evergreen. (T-49). Instead, the initial application submitted to the Board of Regents was only made in furtherance of the statutory mandate of the New York State Education Law establishing the Board of Regents as the only charter entity authorized to issue a charter pursuant to the Act. N.Y. Educ. Law Section 2851(3)(c). While the Union stresses the import of the submission of the initial charter application to the Board of Regents, the Board's role in receipt of the application and not in the generation of the application, was wholly limited to the approval of Evergreen's application and to the issuance of the initial charter agreement and subsequent provisional charters. Thus, the Regional Director properly determined:

...that the Board would see Evergreen's Applicants and other individual founding Trustees, not the Board of Regents, as having 'created' the Employer's charter school corporation...the Board of Regents' act of incorporating the school would not be seen as 'directly creating' it under Hawkins County. Decision at 26.

Mathematics and Science Academy Charter School and Chicago Alliance of Charter Teachers & Staff, 359 NLRB No. 41 (2012), that the Chicago charter school was not a political subdivision and was thus an employer subject to the NLRB's jurisdiction. This case would be binding upon the Region, but for the Board appointments rendered invalid in NLRB v. Noel Canning, 134 S.Ct. 2550 (2014). While the Employer concedes that the Act prescribes the process and procedure for how charter schools within the State of New York are created, the Board of Regents role as a reciprocal of applications and as the ultimate incorporator does not imply State creation. The Employer would refer the Board to its own affirmation of the NLRB's jurisdiction

Association, Case 06-RC-120811, 2014 WL 1390806 (2014). In denying review of the Regional Director's decision upholding the NLRB's jurisdiction, the Board found the facts were similar enough to the Chicago Mathematics case to impute that precedent. Importantly, in applying the Chicago Mathematics decision, the Board implicitly expanded the political subdivision exception for charter schools, as the Pennsylvania charter school was initiated only by individuals (not a corporation as in Chicago) and required the granting of a charter from the state's Department of Education. The Board in Pennsylvania Cyber Charter School, specifically stated "It may be that, absent the Pennsylvania Charter School Law, the entity would not have been created, but that is not the relevant question under Hawkins County or Chicago Mathematics." Id at 1. The order of the Board in this case was binding upon this Region, as it was not impacted by the Noel Canning decision.

As proffered via Brewster's testimony, the individual initiatives of Brewster, Bernardino, and Sotelo, together with other individuals, were the impetus for the founding of Evergreen. The Board of Regents limited role as the statutory charter entity was only born as a result of the private initiative of concerned private actors and not vice versa. The Union wholly discounts this initiative and is misguided and perhaps self-serving when it puts "the cart before the horse" by thinking that the Board would engage in any administrative function absent the actions of private applicants. The Regional Director's founded determination that Evergreen was not directly created by the State should not be disturbed by the semantics of the Union. The Union's lone basis for asserting that Evergreen was created by the State rests on the Board of Regents' administrative function of actually incorporating. Decision at 12. The Union resorts to cherry-picking portions of the underlying Decision and Direction of Election, to wit, on page 5,

suggesting that the Board of Regents somehow incorporated the entity on its own initiative. Nothing could be farther from the truth. Thus, and under any analysis, the Regional Director properly found that the Board of Regents receipt of Evergreen's application, and ultimate incorporation of Evergreen, did not constitute direct creation by the State of New York. For these reasons, the Regional Director's finding in this regard should be wholly affirmed.

#### I. Evergreen is not an administrative arm of the State of New York

The Regional Director's finding that Evergreen is not an administrative arm of the State should also be affirmed. Evergreen is solely governed and administered by private actors, namely, the Board of Trustees. No public entity or State actor controls the day to day affairs of Evergreen. Research Foundation of the City University of New York, 337 NLRB 965 (2002) (holding that an employer that had an independent board of directors and managers and maintained direct and independent control over its employees, management, labor relations, budget, and daily operations was subject to the NLRB's jurisdiction). Again, Brewster testified in no uncertain terms that no State or local municipal actors are involved with the corporate governance function of Evergreen. Specifically, Brewster testified that no officials from the State of New York, the County of Nassau, the Town of Hempstead, the Hempstead Union Free School District and the Village of Hempstead sit on the Board of Trustees. (T-46). In fact, she specifically testified that the Hempstead Union Free School District was opposed to the founding initiative of Evergreen. (T-46,49). Brewster testified that the Board of Trustees, and the Board of Trustees alone, conduct and direct the affairs of Evergreen and are in fact governed by certain provisions of New York Not-For-Profit Corporation Law. As was confirmed through the introduction of Joint Exhibit 10, Evergreen has tax exempt status and has annually filed Form 990 under Section 501(c)(3) of the Internal Revenue Code dating back to the tax year beginning in 2009. (T-46-47). See Joint Exhibit 10.

The Union, in its Request for Review at 18, incredibly makes the argument that, "governance and control of Evergreen is vested with a public official – the Regents." Significantly, and completely contradictory to the Union's argument, both the First and Second Renewal Charters, introduced as Joint Exhibit 3 specifies that:

...the Charter School is not operating as the agent, or under the direction and control, of SED, or the Regents, except as required by law, and that SED or the Regents do not assume any liability for any loss or injury resulting from: (i) the acts and omissions of the Charter School, its directors, trustees, agents or employees; (ii) the use and occupancy of the building or buildings, occupied by the Charter School, or any matter in connection with conditions of such building or buildings; or (iii) any debt or contractual obligation incurred by the Charter School. The Charter School acknowledges that it is without authority to extend the faith and credit of SED, the Regents or the public schools, to any third party.

The above-referenced recital of separation by and between Evergreen and the Board of Regents expressly states that the former is not an extension of the latter and unequivocally undercuts the Union's argument that the Board of Regents exercises any governance, direction, and/or control over the Employer. As patently articulated in both Chicago Mathematics and Pennsylvania Cyber Charter School, the mere fact that there exists an agreement by and between Evergreen and the Board of Regents does not allow any assumption or argument to be advanced that Evergreen is an administrative arm of the government. Pennsylvania Cyber Charter School at 2. The Board has previously recognized that, "No doubt many private entities would not exist but for the public contracts they carry out; they nevertheless are not 'administrative arms of the government' (in the word of Hawkins)." Pennsylvania Cyber Charter School at 2. Accordingly, the Regional Director herein appropriately found that Evergreen was not "created by the State so as to constitute an administrative arm of the government" and therefore fails to meet the first part

of the "political subdivision" test enunciated by the Supreme Court in NLRB v. Natural Gas Utility District of Hawkins County, 402 U.S. 600 (1971).

Notwithstanding the Union's argument, Evergreen's receipt of public funding and it being subject to limited oversight by the Board of Regents also does not make it an administrative arm of the government. Instead, and under Hinds County and it progeny, the Regional Director correctly considered a myriad of factors when engaging in its consideration of whether Evergreen was an administrative arm of the government. It is also well established by the Board that government oversight does not turn a private sector entity into a public agency. Pennsylvania Cyber Charter School at 2. Succinctly, the Regional Director recognized the private nature of Evergreen by noting, "the Employer continues to operate as a separately-incorporated entity, recognized as a non-profit corporation under Section 501(c)(3) of the federal tax code, governed by its self-selected Board of Trustees, and located in space leased from Circulo." Decision at 26-27. Accordingly, the Regional Director properly found that Evergreen was not "created by the State so as to constitute an administrative arm of the government" and thus does not satisfy the first prong of the Hawkins County test.

## B. Evergreen is not Administered by Individuals Responsible to Public Officials or to the General Electorate

The Regional Director also correctly determined that Evergreen Trustees are not responsible to public officials or to the general electorate. Decision at 28. As such, Evergreen does not meet the second prong of the "political subdivision" test enunciated by the Supreme Court in <u>Hawkins County</u>. Specifically, Evergreen is not administered by any individuals who are responsible to public officials or to the general electorate. The NLRB has traditionally been aided in making this determination by considering "the composition, selection and removal of the employer's board of directors as determined by law or the employer's own governing

documents". <u>Charter School Admin. Servs., Inc.</u>, 353 NLRB 394 (2008); <u>Research Foundation</u> of the City University of New York, 337 NLRB 969 (2002).

Application of the foregoing precedent to Evergreen clearly reveals that no members of the Board of Trustees are appointed by and/or subject to removal by public officials or the general electorate. As recently articulated by the Court of Appeals in New York Charter School Association v. Smith, 15 N.Y. 3d 410 (2010), charter schools "are not governed by appointees of the government, but by self-selecting board of trustees." Id. at 410. For charter schools, governing trustees are in no way placed into office analogous to the local, State, and federal electoral process conducted within the State of New York. Instead, the testimony of Brewster confirmed that unlike in local school board elections there is no election process and that each Evergreen Trustee is instead selected by a majority vote of the Board of Trustees. (T-50-51). Likewise, review of the pertinent By-Laws confirms that the Board of Regents itself does not possess any authority to remove individual trustees of the Evergreen Charter School. To the contrary, Brewster testified that individual trustees of Evergreen are only subject to removal by the Board of Trustees themselves under both "cause" and "without cause" provisions of the By-Laws. (T-51.)

The Regional Director's founded determination reveals itself after reference to Joint Exhibit 4, the By-Laws of the Evergreen Charter School. Article III reveals the selection and removal process for each Evergreen Trustee. Specifically, Article III of the School's most recent By-Laws provides in relevant part the following:

- 2. <u>Election.</u> The Board shall elect Trustees by the vote of the majority of the Trustees then in office. Trustees-elect assume office subject to approval by the Charter Entity
- D. <u>Removal of Trustees</u>. The Board may remove a Trustee for cause upon majority vote of all Trustees (other than the Trustee subject to removal). In addition, a trustee may be removed from office on examination and due proof of the truth of a written complaint by

any trustee, of misconduct, incapacity or neglect of duty; provided, that at least one week's previous notice of the proposed action shall have been given to the accused and to each trustee. The Board may remove a Trustee without cause upon 100% vote of all Trustees (other than the Trustee subject to removal.) See Joint Exhibit 4.

On the same front, both the First and Second Renewal Charters, introduced as Joint Exhibit 3, references the appointment mechanism for the Board of Trustees. Both Renewal Charters provide the following:

2.13 Governance; School Trustees; By-Laws. (a) The Charter School shall be governed by a Board of Trustees. All individuals elected or appointed to the Board shall possess the qualifications for such positions as are set forth in the Renewal Application...The Board shall operate pursuant to the bylaws and other rules and procedures set forth in the Renewal Application, including but not limited to the term of office permitted and the provisions for the election and appointment of new members. See Joint Exhibit 3.

Lastly, it should be noted that nothing contained within the New York Charter Schools Act authorizes the Board of Regents or a charter entity to appoint or remove any trustee of the Evergreen Charter School. *See* N.Y. Educ. Law Sections 2851-2857. There is no merit to the Union's assertion that N.Y. Education Law Section 226.4 authorizes the Board of Regents to remove a charter school trustee. The Union conveniently overlooks the express statutory restriction of N.Y. Education Law Section 226 which limits the application of the statute by stating "trustees of every corporation created by the regents, <u>unless otherwise provided by law or by its charter</u>." The Union blatantly fails to provide any legislative intent that the legislature of the State of New York meant to empower the Board of Regents with this authority in relation to charter school trustees. Obviously, the Evergreen Charter provides for an alternative method of appointment and removal of trustees, to wit, a vote of the Board of Trustees themselves. As such, N.Y. Education Law Section 226.4 of the Education Law is misplaced and irrelevant to any determination herein.

Instead, and controlling to the Board's review herein, New York Education Law Section 2853 grants education corporations all corporate powers necessary and desirable for carrying out a charter school program and further incorporates by reference those powers enumerated under the New York Not-For-Profit Law. Specifically, Section 706 of the Not-For-Profit Law states that "any and all of the directors may be removed for cause by vote of the members, or by vote of the directors, provided there is a quorum, of not less than a majority present at the meeting at which action is taken." *See* N.Y. Not-For-Profit Law Section 706. Thus, and under this additional statutory construct, nothing contained in the Not-For-Profit law permits any outside or third-party entity to appoint or remove an Evergreen Trustee.

In fact, and largely relevant to the Regional Director's founded application of <u>Hawkins</u> <u>County</u> herein, the Employer would submit that there exists a specific statutory basis for the Board not to construe Evergreen as a "political subdivision". Simply stated, charter schools are expressly distinguished from political subdivisions within New York Education Law Section 2854 (1)(b). The statute states in relevant part the following:

A charter school shall meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools, except as otherwise provided in this article. A charter school shall be exempt from all other state and local laws, rules, regulations or policies governing public or private schools, boards of education, school districts and **political subdivisions**, including those relating to school personnel and students, except as specifically provided in the school's charter or in this article. N.Y. Educ. Law Section 2854(1)(b).

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For all of the foregoing reasons, the Regional Director appropriately found that Evergreen does not meet the second prong of the <u>Hawkins County</u> test and is therefore <u>not</u> an exempt political subdivision of the State of New York.

#### **POINT II**

# THE REGIONAL DIRECTOR CORRECTLY APPLIED THE PENNSYLVANIA CYBER CHARTER SCHOOL AND SUPREME COURT PRECEDENT IN MAKING HIS <u>DECISION</u>

The Regional Director appropriately relied upon the Board decision in Pennsylvania Cyber Charter School to determine that Evergreen was not a "political subdivision" of the State of New York. In the first instance, the Regional Director in Pennsylvania Cyber Charter School appropriately applied both the Hawkins County two-prong test and the findings set forth in Chicago Mathematics. Secondly, and despite the Union's position, any distinction between Pennsylvania and New York law in regard to the statutory establishment of a charter school did not bar the Regional Director from relying on the same precedent herein. Fatal to the Union's cited distinction is the fact that Evergreen directly filed an application with the Board of Regents to open and operate a charter school in June, 2008. In the above-referenced Pennsylvania case, like herein, the state Department of Education thereafter ultimately granted an initial charter to a group of unincorporated individuals. As such, the Union's attenuated explanation of the twostep statutory process to establish a charter school in the State of New York is irrelevant to the establishment of Evergreen. Instead, the founders of Evergreen applied directly to the Board of Regents for its provisional charter in one step. Therefore, the Regional Director's reliance on the above-referenced precedent was appropriate and the Union's cited distinction makes no difference.

#### **POINT III**

# THERE IS NO SUBSTANTIAL QUESTION OF LAW OR POLICY RAISED BY THIS JURISDICTIONAL ISSUE, NOR ARE THERE COMPELLING REASONS TO DECLINE JUSTISDICTION

It is established that the Board will grant a Request for Review of a Regional Director's decision when "a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent." NLRB Rules and Regulations Section 102.67(c)(1). Nothing merits the Board to decline to exercise jurisdiction over Evergreen herein. The Union's suggestion that any regional or national precedent in which regional directors and the Board asserted jurisdiction over charter schools has no value to the ultimate determination to be made herein is absurd. Although the Union would have the Board simply ignore recent regional and national decisions because review has been granted, the Regional Director appropriately relied on cases that addressed the legal framework of State charter schools, under which Evergreen was founded. Moreover, and contrary to the Union's argument, the Regional Director in Riverhead Charter School and Riverhead Charter School Employees' Association, Case No. 29-RD-132061 (2014) referenced those cases as "precedent". Riverhead at 37.

In both Hyde Leadership Charter School-Brooklyn and United Federation of Teachers, Case No. 29-RM-126444 (2014) and Riverhead the Regional Director found the NLRB possessed appropriate jurisdiction over the charter schools' labor disputes. As appropriately relied upon by the Regional Director herein, Hyde Leadership discussed the hybrid nature of charter schools in the State of New York, which have elements of both public and private entities. Similar to the underlying Decision herein, Hyde Leadership further examined the conflicting interpretations given by State courts and agencies surrounding the public vs. private nature of charter schools in New York. The Regional Director held that despite public identifiers

and even the Act's provision expressly subjecting its employees to the State Public Employees Fair Employment Act, that the NLRB could still usurp jurisdiction in light of prior NLRB holdings that a state's legislative intent is not controlling for jurisdictional purposes. Id. at 16. In so holding, the Regional Director in Hyde Leadership reviewed the process for establishing and operating a charter school in the State. While a school's charter is issued by the Board of Regents, a public entity, the application to establish a charter school is typically filed by individuals. The board of trustees of the charter school is also selected by the applicants, and no trustees must be public officials, nor are they appointed by public officials. The charter entity must enter into a charter agreement with a public school district. Like herein, that charter agreement is approved by the Board of Regents, resulting in the incorporation of the charter entity as a separate, independent, non-profit education corporation. Once the charter is approved, the charter school's board of trustees has final authority for policy and operational decisions of the school. Id. at 3-6.

It should be noted that notwithstanding the Union's litany of procedural authority regarding NLRB precedential value, the Regional Director still asserted jurisdiction over the Riverhead Charter School in August, 2014, two months after the decision of Noel Canning, 134 S.Ct. 2550 (June 26, 2014). While Hyde Leadership relied heavily upon Chicago Mathematics, which is no longer valid precedent due to Noel Canning, the Regional Director in Riverhead found this insignificant since the Board implicitly adopted (and even arguably expanded) the Chicago Mathematics analysis in Pennsylvania Cyber Charter School. Specifically, the Regional Director in Riverhead directly relied upon and implemented the Hawkins County test and the analytical framework of Chicago Mathematics when it found that Riverhead Charter School was not exempt as a "political subdivision" and asserted NLRB jurisdiction.

The Employer acknowledges that these two Regional Director decisions are pending review by the Board. However, unless and until the Board renders a decision to the contrary, these cases were appropriately afforded significant weight in this Region. Moreover, the Regional Director did not act in error when he relied upon the same authority. There are simply no facts in this case that are dissimilar enough from <a href="Hyde Leadership">Hyde Leadership</a> or <a href="Riverhead">Riverhead</a> to warrant disparate treatment. Those cases focused on the State laws, regulations, and decisions that apply to all charter schools created in New York State, including Evergreen.

Lastly, there is no compelling reason for the Board to decline jurisdiction over New York State charter schools. While the Union repeatedly cites that the legislative intent of the State legislature was to treat charter schools as public schools, review of the New York State Charter Schools Act suggests otherwise. Again, the Act itself is replete with reference to the legislature's intention to distinguish charter schools from public schools. Charter school employees are considered "...employees of the education corporation formed to operate the charter school and not an employee of the local school district in which the charter school is located". N.Y. Educ. Law Section 2854(3). The Act does not make charter schools public schools for the purpose of labor relations. Employees of a charter school not converted from an existing public school are not deemed members of any existing collective bargaining unit representing employees of the school district in which the charter school is located and its employees are not subject to any existing collective bargaining agreement between the school district and the its employees. N.Y. Educ. Law Section 2854(3)(b-1). Moreover, State law does not require charter school personnel to be deemed employees of the local school district for the purpose of providing retirement benefits through the Teachers Retirement System. Instead, and unlike the Union's members in public school districts, eligibility to participate in the Teacher Retirement System is not automatic.

Continuing and pursuant to N.Y. Education Law Section 2855, "The regulatory power of the board of regents and the commissioner shall not extend to charter schools except as otherwise specifically provided in this article." N.Y. Educ. Law Section 2855(5). The Act even expressly insulates both the charter entity and the Board of Regents from any liability resulting from the charter school by stating the following in relevant part:

..no civil liability shall attach to any charter entity, the board of regents, or to any members or employees, individually or collectively, for any acts or omissions of the charter school. Neither the local school district, the charter entity nor the state shall be liable for the debts or financial obligations of a charter school or any person or corporate entity who operates a charter school. N.Y. Education Law Section 2853 (1)(b-1)(g).

Significantly, "...A charter school shall be exempt from all other state and local laws, rules, regulations or policies governing public or private schools, boards of education, school districts and political subdivisions, including those relating to school personnel and students, except as specifically provided in the school's charter or in this article. N.Y. Educ. Law Section 2854(1)(b).

Although the Union would have the Board believe that Evergreen represents an expansion of educational opportunities that are available within the Hempstead Union Free School District, N.Y. Education Law Section 2850 "...authorizes a system of charter schools to provide opportunities for teachers, parents, and community members to establish and maintain schools that operate <u>independently</u> of existing schools and school districts..." Id. Detailing the impetus for the founding Evergreen, Brewster testified, "We started the charter school ourselves in response to the needs of children and families...because in Hempstead there's failing school districts and we really wanted to respond to the needs of children and families." (T-33).

Accordingly, and because there is no question of law or policy to be addressed herein, and no compelling reason for the Board to decline to assert jurisdiction over all charter schools within the State of New York, it is submitted that the Board should deny the Union's Request for Review and continue to assert jurisdiction over the Evergreen Charter School.

#### **CONCLUSION**

For all the reasons set forth above, we respectfully request for the Board to deny the Union's Request for Review.

Dated: Hauppauge, New York

July 15, 2016

Respectfully submitted,

INGERMAN SMITH, LLP

Bv:

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